

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

**Prehearing Statement of the United States of America, Department of the Interior,
Bureau of Land Management**

**IN THE MATTER OF STAFF'S RECOMMENDATIONS FOR AN INSTREAM
FLOW APPROPRIATION ON THE SAN MIGUEL RIVER BELOW CALAMITY
DRAW, WATER DIVISION 4**

Pursuant to Rule 5n(2) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules"), the Bureau of Land Management ("BLM") hereby submits its prehearing statement in support of the Colorado Water Conservation Board ("CWCB") staff's recommendations for an instream flow appropriation on the San Miguel River between the confluence with Calamity Draw and the confluence with the Dolores River. The BLM supports the appropriation on the reach in the locations, timing, and amounts adopted by the CWCB at its January 2011 regularly scheduled board meeting. The CWCB adopted the locations, timing, and amount set forth in the CWCB staff recommendation report made available to the CWCB and the public at the January 2011 CWCB regularly scheduled board meeting (this recommendation is available for review on the CWCB's website at www.CWCB.state.co.us).

A. FACTUAL CLAIMS

1. There is a natural environment that can be preserved on the subject reach of the San Miguel River. The finding of a natural environment is based upon fish surveys conducted the Colorado Division of Wildlife, riparian inventories conducted by Colorado Natural Heritage Program, and aquatic macroinvertebrate surveys conducted by BLM.
2. The instream flow location, amount and timing originally recommended by the CWCB staff at the January 2011 board meeting:
 - a) is based upon an accurate PHABSIM (Physical Habitat Simulation) analysis, which is a standard scientific methodology for identifying the amount of physical habitat available for fish at various flow rates in a specified stream channel
 - b) is based upon a set of habitat suitability curves that are appropriate for the fish species and the life stages to be protected
 - c) is based upon a set of habitat suitability curves that are appropriate for the San Miguel River stream channel

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- d) is based upon a reasonable selection of protective flow rates taken from the weighted usable area curves produced by the PHABSIM analysis
 - e) is based upon an accurate application of the R2Cross hydraulic modeling procedures
 - f) is based upon an accurate application of hydraulic criteria for instream flow determinations utilizing the R2Cross methodology
 - g) is required to preserve the natural environment to a reasonable degree.
3. The natural environment on the subject reach of the San Miguel River:
- a) includes native and introduced fishes, aquatic macroinvertebrates, and riparian communities
 - b) can be preserved with an instream flow appropriation that is based upon the flow needs of flannelmouth sucker and bluehead sucker, because those species are indicator species for other elements of the natural environment that rely upon a hydrograph with a natural shape
 - c) will be preserved to a reasonable degree with the proposed ISF water right, and
 - d) can exist without material injury to existing water rights, including conditional surface water rights and conditional storage rights.
4. The water availability analysis conducted by the CWCB in support of the January 2011 instream flow appropriation:
- a) is based upon scientifically accepted hydrologic analysis procedures
 - b) relies upon data from multiple historic gaging sites, all of which demonstrate that sufficient water is available for the proposed appropriation
 - c) reflects an amount of water that is available for appropriation as an ISF right, utilizing standard procedures employed by the CWCB to evaluate a range of hydrologic year types
5. The BLM supports the staff recommendations as set forth in the January 2011 Staff Report and Recommendation on the subject reach of the San Miguel River.
6. The BLM hereby adopts the factual claims set forth in the CWCB staff's Prehearing Statement.

B. LEGAL CLAIMS

1. The BLM is a party to these proceedings pursuant to Rule 5l(4) of the ISF Rules.
2. Because ISF water rights are nonconsumptive and do not divert water from the stream, the CWCB can appropriate an ISF right that is based upon the flow of water that will be diverted downstream by a senior water right.

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3. Even though the proposed ISF will be junior to existing water rights on the stream system, the CWCB can make appropriations based on water availability at the time of the proposed appropriation, without subtracting flow rates or volumes that have been adjudicated to conditional or presently unexercised water rights.
4. The proposed instream flow water right will not deprive the people of the State of Colorado of their right to develop the volume of water allocated to the State of Colorado under the Colorado River Compact. The proposed instream flow water right leaves substantial water volumes available for new junior water rights and future water development.
5. In determining the amount of water available for an instream flow appropriation, the CWCB is not limited to the amount of water available during drought years. Instead, the CWCB may consider the amount of water available in a range of hydrologic conditions.
6. The CWCB has the discretion to determine amount and timing of water necessary to preserve the natural environment to a reasonable degree.
7. The original CWCB staff ISF recommendation for the subject reach of the San Miguel River meets all of the substantive and procedural requirements outlined in the ISF Rules.
8. The CWCB's appropriation of an instream flow water right on the subject reach of the San Miguel River would further the express intent of Section 37-92-103(3), C.R.S. to "correlate the activities of mankind with some reasonable preservation of the natural environment."
9. The BLM hereby adopts the legal claims set forth in the CWCB staff's Prehearing Statement.

C. EXHIBITS TO BE INTRODUCED AT HEARING

1. January 2011 Staff Analysis and Recommendation on the subject reach of the San Miguel River. This report, along with its appendices, contains maps of the proposed reach, proposed ISF amounts and timing, and water availability calculations. This report, and supporting appendices, are available for review on the CWCB's website at www.CWCB.state.co.us, and is included in the CWCB's Prehearing Statement. In the hearing, BLM will refer to this report and its appendices as **Exhibit 1**.
2. Range-Wide Conservation Agreement and Strategy for Roundtail Chub, Bluehead Sucker, and Flannemouth Sucker, September 2006. This document appears as Appendix A to the CWCB Staff Analysis and Recommendation on the subject reach of the San Miguel and is available for review of the CWCB website at: <http://cwcbweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=146683&searchid=55a060a6-154b-4dc0-a474-0377a6c0fcde&dbid=0>

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3. Colorado Natural Heritage Program Potential Conservation Area Reports for the San Miguel River, dated May 13, 2010. This document appears as Appendix B to the CWCB Staff Analysis and Recommendation on the subject reach of the San Miguel and is available for review of the CWCB website at:

<http://cwcwweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=146683&searchid=55a060a6-154b-4dc0-a474-0377a6c0fcde&dbid=0>

4. Colorado Division of Wildlife Fish Sampling Report Dated July 15, 2008. This document appears as Appendix C to the CWCB Staff Analysis and Recommendation on the subject reach of the San Miguel and is available for review of the CWCB website at:

<http://cwcwweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=146683&searchid=55a060a6-154b-4dc0-a474-0377a6c0fcde&dbid=0>

5. Bureau of Land Management Aquatic Macroinvertebrate Monitoring Report, dated November 3, 2000. This document appears as Appendix D to the CWCB Staff Analysis and Recommendation on the subject reach of the San Miguel and is available for review of the CWCB website at:

<http://cwcwweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=146683&searchid=55a060a6-154b-4dc0-a474-0377a6c0fcde&dbid=0>

6. PHABSIM for Windows User Guide. This document appears as Appendix E to the CWCB Staff Analysis and Recommendation on the subject reach of the San Miguel and is available for review of the CWCB website at:

<http://cwcwweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=146683&searchid=55a060a6-154b-4dc0-a474-0377a6c0fcde&dbid=0>

7. Riverine Fish Flow Investigation Study Report (Federal Aid Project F-289-R6) written and performed by Richard Anderson, CDOW Aquatic Researcher, and Gregory Stewart, Department of Geosciences Oregon State University, 2003. This document appears as Appendix F to the CWCB Staff Analysis and Recommendation on the subject reach of the San Miguel and is available for review of the CWCB website at:

<http://cwcwweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=146683&searchid=55a060a6-154b-4dc0-a474-0377a6c0fcde&dbid=0>

8. Development of Instream Flow Recommendations Using R2Cross, Colorado Water Conservation Board, dated January, 1996. This document appears as Appendix G to the CWCB Staff Analysis and Recommendation on the subject reach of the San Miguel and is available for review of the CWCB website at:

<http://cwcwweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=146683&searchid=55a060a6-154b-4dc0-a474-0377a6c0fcde&dbid=0>

9. Surface and Groundwater Interactions Along the Middle and Lower San Miguel River, CO: Implications for Plant Water Sources, Plant Water Status, and the Susceptibility of Riparian Vegetation to Impacts from Changing River Base Flows, by David J. Cooper, Ph.D and Peter A. Conovitz, M.S., dated June 2001.

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10. BLM may introduce demonstrative, rebuttal, or other exhibits as allowed by the CWCB or agreed upon by the Parties.
11. The BLM hereby adopts all Exhibits listed in the CWCB staff's Prehearing Statement.
12. The BLM may rely upon exhibits introduced or disclosed by any other party to this hearing.

D. WITNESSES

The following witnesses may testify at the hearing as described below, may give rebuttal testimony, and may be available at the hearing to answer questions from the CWCB.

1. Roy Smith, water rights and instream flow coordinator for the BLM (resume will be referred to as **Exhibit 2**). Mr. Smith may testify about data collection methods, selection of data collection sites, PHABSIM modeling efforts, how the BLM formulates ISF recommendations, and specifically how he worked with Colorado Division of Wildlife to formulate the BLM's recommendation for the subject reach of the San Miguel River.
2. Dennis Murphy, retired BLM hydrologist for the Uncompahgre Field Office (resume will be referred to as **Exhibit 3**). Mr. Murphy may testify about data collection methods, selection of data collection sites, and hydrologic characteristics of the subject reach of the San Miguel River. In addition, Mr. Murphy may testify regarding channel morphology, riparian characteristics, and fishery characteristics of North Fork Escalante Creek.
3. The BLM may call any witness declared by any other party to this hearing.

E. WRITTEN TESTIMONY

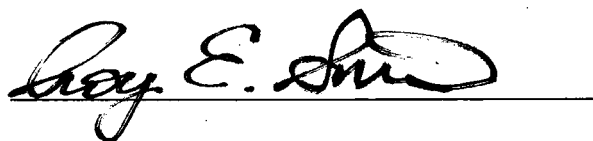
BLM does not seek to enter any written testimony at this time. The BLM hereby adopts any written testimony listed in the CWCB staff's Prehearing Statement.

F. LEGAL MEMORANDA

BLM does not seek to enter any legal memoranda at this time. The BLM hereby adopts any legal memoranda listed in the CWCB staff's Prehearing Statement.

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Respectfully submitted this 8th day of July, 2011.

A handwritten signature in black ink, reading "Roy E. Smith", is written over a horizontal line.

Roy E. Smith
Water Rights and Instream Flow Coordinator
Bureau of Land Management
Colorado State Office
2850 Youngfield St.
Lakewood, CO 80215
Telephone: 303-239-3940
Fax: 303-239-3933
E-Mail: r20smith@blm.gov

Roy E. Smith
1170 S. Clayton St.
Denver, CO 80210

EXHIBIT 2

EDUCATION

University of Michigan – Ann Arbor, MI
Master of Science, Natural Resource Management, 1991
Focus Areas: Water Law/Policy, Wildland Hydrology, Riparian/Wetland Ecology

Lewis & Clark College – Portland, OR
Bachelor of Science, Biology and Communication, 1985

WORK EXPERIENCE

Water Resources Program Lead

Bureau of Land Management – Colorado State Office/Utah State Office
Dates Employed – 2005 to present

Direct BLM participation in Colorado and Utah water allocation systems. Develop hydrologic, legal, and factual basis for BLM participation in complex surface water and ground water cases. Direct BLM's participation in instream flow protection issues, including management of hydrologic studies and negotiations with other water users. Manage BLM relationships with municipalities, water districts, corporations, and individual water users. Review BLM planning documents for sufficiency in water resource management direction. Provide oversight technical assistance for implementation of Wild and Scenic Rivers Program. Serve as instructor and course designer for water resources classes offered by BLM's National Training Center.

Water Rights and Instream Flow Coordinator

Bureau of Land Management – Colorado State Office
Dates Employed – 1996 to 2004

Directed BLM Colorado's participation in the State of Colorado water court system and instream flow allocation system. Managed BLM relationships with municipalities, water districts, corporations, and individual water users. Coordinated with other federal, state, and local agencies to conduct instream flow assessments, including assessments of hydrology, aquatic biology, recreation, and legal issues. Coordinated litigation with Department of Justice and Solicitor's Office.

Water Rights Specialist

Bureau of Land Management - Colorado State Office
Dates Employed: 1992 to 1995

Directed BLM Colorado's participation in the State of Colorado water court system. Coordinated litigation with Department of Justice and Solicitor's Office. Coordinated with multiple BLM programs to create legal strategy, hydrologic basis, and factual foundation for

water rights filings. Provided legislative, policy and technical support to BLM Washington Office on water rights issues. Provided technical support for BLM acquisition of water rights during land exchanges and land acquisitions.

Research and Teaching Assistant

University of Michigan - School of Natural Resources

Dates Employed: 1990 to 1991

Led discussion sections and evaluated student work for graduate level class in natural resource policy. Organized collaborative research and training with foreign universities.

Project Coordinator

World Wildlife Fund/Conservation Foundation – Washington, DC

Dates Employed: 1987 to 1990

Wrote funding proposals for projects in aquatic research, wildlife protection, forestry research, and rural development in South America. Evaluated protection and management projects implemented in national parks in Ecuador. Investigated and analyzed strategies used by U.S. local governments to finance public acquisition of open space.

Account Executive

Waggener Edstrom Consulting - Portland, OR

Dates Employed: 1985 to 1987

Transformed goals for market positioning, visibility, and consumer education into specific marketing plans for technology companies. Coordinated special events, news conferences, and publications which resulted in local and nationwide media coverage. Developed marketing plans for systems software developed by high technology companies, such Microsoft Windows, Microsoft MS-DOS, Microsoft OS-2.

SELECTED PROJECTS AND PUBLICATIONS

Project Leader and Editor

Arkansas River Instream Flow Assessment - 2000

Cooperative Study Involving BLM, USFS, Reclamation, and Colorado DNR

Co-Author - "Arkansas River Legal and Institutional Analysis"

Chapter in Arkansas River Water Needs Assessment - 2000

Cooperative Study Involving BLM, USFS, Reclamation, and Colorado DNR

Project Lead

San Miguel River Instream Flow Investigations and Recommendations - 2007

Cooperative Study Involving BLM and Colorado Division of Wildlife

Project Lead

Dominguez Canyon Wilderness Instream Flow Investigations and Recommendation – 2010

EXHIBIT 3

Dennis M. Murphy
62342 Gail Court
Montrose, CO 81401
(970) 249-7273 Ph, Cell (970) 901-0735
Yhprum12@q.com

Career Goal

I am seeking part-time or "as needed" employment to continue to use my education, experience, and passion for managing water and soil resources.

Experience

- Abandon mine reclamation
- Army Corp of Engineers permits
- Climate data collection and analysis
- Colorado and federal water law
- FERC hydroelectric licensing
- Groundwater assessments
- Instream flow assessments and water rights
- Native and invasive plant identification and plant community assessments
- Presentations to NGO's, schools, and special interest groups
- Riparian vegetation and stream channel assessment
- River icing processes and management
- Soil and water analyses for environmental assessments and impact statements
- Soil and water assessments for mining, and oil and gas development
- Soil and water GIS applications
- Soil and water lab analyses
- Soil erosion monitoring and modeling using WEPP and RUSLE
- Storm water management
- Stream flow and watershed runoff modeling (Army Corps of Eng., HEC models)
- Stream restoration
- Water quality monitoring (chemical, physical, and biological)
- Watershed condition analysis
- Wildfire impact assessment and rehabilitation
- Wild and Scenic Rivers Act

Education

1971-1974 Burlington County Community College, NJ, AA - Business Administration
1975 -1978 Utah State University, Logan UT, BS - Forestry (minor and 1 year graduate work in watershed science) Honor Roll 3 quarters, Dean's List 4 quarters